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SCOT 14-0001069

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FRANCES LATHERS; MERRILL LATHERS; CASSANDRA WYLIE; BRAD L. COFFEL; KATHLEEN WALKER; ANDREW LEO; and AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I,

Plaintiffs,

vs.

NEIL ABERCROMBIE, in his official capacity as the Governor of the State of Hawai'i; DAVID M. LOUIE, in his official

(caption continued on next page)

ORIGINAL PROCEEDING

STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

CERTIFICATE OF SERVICE

capacity as the Attorney General of the State of Hawai'i; SCOTT NAGO, in his official capacity as Chief Election Officer for the State of Hawai'i; and STEWART MAEDA, County Clerk, Office of Elections, County of Hawai'i,

Defendants.

STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Governor Neil Abercrombie, Attorney General David M. Louie, and Scott Nago, Chief Election Officer, respectfully request that this Court immediately dismiss Plaintiffs' first amended complaint.[1] As outlined in the attached memorandum, Plaintiffs' case is not a true election contest. It does not fall within the narrow jurisdiction granted by statute for original proceedings in *this* Court to determine the results of an election. Neither does it qualify under the exception created by this Court for challenges to constitutional amendments. This case is a civil action filed in the wrong court, and nothing more.

This motion is brought pursuant to Haw. R. App. P. Rule 27 and Haw. R. Civ. P. Rules 12(b)(1) and (b)(6). See Haw. R. Civ. P. 81(b)(10) (civil procedure laws govern proceedings regarding elections). For all the reasons stated in the attached memorandum, State Defendants respectfully request that this Court dismiss this action and that it do so immediately, so as not to delay the critical actions necessary to prepare the State of Hawaii for the November 4, 2014 general election.

[1] Governor Neil Abercrombie, Attorney General David M. Louie, and Scott Nago, Chief Election Officer, are all named in their official capacities only. FAC at 6-7 (¶¶ 13-15). They are together referred to as State Defendants.

DATED: Honolulu, Hawaii, August 25, 2014.

Respectfully submitted,

/s/ Deirdre Marie-Iha
DEIRDRE MARIE-IHA
Deputy Attorney General

Attorney for State Defendants

SCOT 14-0001069

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FRANCES LATHERS; MERRILL LATHERS; CASSANDRA WYLIE; BRAD L. COFFEL; KATHLEEN WALKER; ANDREW LEO; and AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I, Plaintiffs, vs. NEIL ABERCROMBIE, in his official capacity as the Governor of the State of Hawai'i; DAVID M. LOUIE, in his official capacity as the Attorney General of the State of Hawai'i; SCOTT NAGO, in his official capacity as Chief Election Officer for the State of Hawai'i; and STEWART MAEDA, County Clerk, Office of Elections, County of Hawai'i, Defendants.	ORIGINAL PROCEEDING

MEMORANDUM IN SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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MEMORANDUM IN SUPPORT OF
STATE DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

INTRODUCTION

This case is a civil action masquerading as an election contest. It is a deliberate attempt to avoid the laws governing Hawaii's primary elections. There is one simple reason why Plaintiffs have cast their complaint as an election contest when it isn't one in truth: they wanted to file in this Court now. As outlined below, this Court must unequivocally reject this attempt to circumvent the strict jurisdictional limitations set by Hawaii Revised Statutes (HRS) chapter 11. Plaintiffs' case is *not* a proper election contest. Nor is it like Taomae v. Lingle, 108 Hawai'i 245, 118 P.3d 1188 (2005) and the cases that preceded it, which concerned constitutional amendments on a general election ballot. These cases do *not* support Plaintiffs' attempt to invoke this Court's jurisdiction here.

Nor should this Court accept Plaintiffs' invitation to allow *any case that has anything to do with an election* to be filed before this Court in the first instance. Plaintiffs ask the Hawaii Supreme Court to act as a trial court. They want this Court: (1) to resolve unproven, contested *questions of fact* regarding the individual Plaintiffs' access to the polls on the day of the primary election, (2) to declare a state statute unconstitutional *based on those contested, unproven facts*, and (3) to enjoin the Office of Elections from taking the steps that are absolutely critical to prepare for the general election. But none of these remedies are proper in a primary election contest, which is the only method by which the results of a primary election can be challenged in ***this*** Court.

If Plaintiffs want to assert a claim that a state statute was implemented in a manner that was unconstitutional, such a suit could properly be filed in circuit court. It is completely improper for Plaintiffs to seek to bypass the normal process of litigation while simultaneously

asserting that they need *not* meet the statutory requirements that *would* give this Court jurisdiction over a primary election contest. Yet that is precisely what Plaintiffs' complaint seeks to do. The motion to dismiss must be granted.

STANDARDS FOR MOTION TO DISMISS

A Haw. R. Civ. P. Rule 12(b)(1) motion to dismiss for lack of jurisdiction is based on the lack of subject matter jurisdiction.[2] It is a question of law.

Under Haw. R. Civ. P. Rule 12(b)(6), in considering a motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept as true the plaintiff's allegations and view them in the light most favorable to the plaintiff. In re Estate of Rodgers, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003). Dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. AFL Hotel & Restaurant Workers Health & Welfare Trust Fund v. Bosque, 110 Hawai'i 318, 321, 132 P.3d 1229, 1232 (2006).

However, "in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Kealoha v. Machado, 131 Hawai'i 62, 74, 315 P.3d 213, 255 (2013) (quoting Pavsek v. Sandvold, 127 Hawai'i 390, 403, 279 P.3d 55, 68 (App. 2012) and Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985)). Conclusory allegations and unwarranted inferences are also not sufficient to defeat a motion to dismiss. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998); Sherman v. Yakahi, 549 F.2d 1287, 1289 (9th Cir. 1977).[3]

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[2] The Hawai'i Rules of Civil Procedure apply to proceedings concerning elections. See Haw. R. Civ. P. 81(b)(10).

[3] In instances where the Hawaii case law and statutes are silent, the Court can look to parallel federal law for guidance. Gold v. Harrison, 88 Hawai'i 94, 103, 962 P.2d 353, 362 (1998).

ARGUMENT

A. This Case Is Not an Election Contest and Does Not Fit Within the *Taomae* Line of Cases Regarding Atypical Election Contests

This case is not a typical election contest. Plaintiffs admit as much. FAC at 3-4 (¶4). This is a critically important point, because there are only two ways this Court has *original* jurisdiction over an election dispute. The first is a typical election contest, which this case is not. And the second is an election contest regarding amendments to the state constitution.[4] This case is not that either.

As a general matter, this Court *does* have jurisdiction over election contests. This is so because (1) Hawai'i Constitution Article II, section 10 says that "[c]ontested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law[;]" and (2) HRS chapter 11, part XI, gives this Court jurisdiction. See HRS § 11-172 ("With respect to any election, any candidate, or qualified political party directly interested, or any thirty voters of any election district, may file a complaint in the supreme court."). Part XI of chapter 11 is an unmistakable invocation of the authority granted by Article II, section 10. HRS § 11-171 states, mirroring the Hawai'i constitution, that "[t]his part shall apply *whenever a contested election is subject to determination by a court* of competent jurisdiction in the manner provided by law." (emphasis added). In other words, an *original proceeding* brought in *this* Court to challenge the result of an election can *only* be brought under part XI of chapter 11: election contests. See Akizaki v. Fong, 51 Haw. 354, 357, 461 P.2d 221, 223 (1969) (courts are the "final arbiter" of election contests under same provision of the Hawaii constitution).

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[4] This holding comes from Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979), Watland v. Lingle, 104 Hawai'i 128, 85 P.3d 1079 (2004) and Taomae v. Lingle, 108 Hawai'i 245, 118 P.3d 1188 (2005). As discussed below, Plaintiffs' case does not fall under this line of cases.

This is why Plaintiffs' admission that their case is not an election contest is so important. Since it is not, Plaintiffs have admitted that this Court lacks jurisdiction in the manner typically provided by the election contest laws. And, as explained below, Plaintiffs' case also cannot fall under the special rule for constitutional amendments articulated in Taomae and the cases that preceded it. Consequently, this Court has no jurisdiction and the complaint must be promptly dismissed.

1. Determining the Result of a Primary Election is the 'Exclusive' Relief that Could be Granted in an Original Proceeding in This Court

In election contests concerning primary elections, the determination of which candidate was nominated is the "***only***" relief a plaintiff could be entitled to under HRS § 11-173.5(b). Funakoshi v. King, 65 Haw. 312, 315, 651 P.2d 912, 914 (1982) (emphasis added). See HRS § 11-173.5 ("The judgment shall decide what candidate was nominated or elected, as the case may be[.]"). As this Court specifically held in Funakoshi, "HRS § 11-173.5(b) does not provide for a judgment that would invalidate the primary election and allow a new election. The legislature only provided for this extraordinary remedy in its statutory provisions pertaining to *general*, special general and special elections.") 65 Haw. 315, 651 P.2d at 914 (emphasis added).

Plaintiffs here, in contrast, request all kinds of relief that are completely foreign to the statutes governing primary election contests. See FAC at 25-27. Funakoshi in fact *forbids* this relief. *Nowhere* in chapter 11 does the law contemplate using an election contest to (a) declare a state statute unconstitutional, (b) rule that the exercise of discretion under that statute was unconstitutional, (c) require that a primary election be re-opened via a special election for an unidentified group of people, (d) prevent the Office of Elections from certifying the election, thus jeopardizing the Office's efforts to prepare for the general election or (e) order the Office of Election to notify voters about a new special election, which itself is forbidden by the statute.

All of this requested relief—especially seeking a new "special" primary election for an as-yet-identified group of voters—is flatly inconsistent with the limited relief this Court is authorized to grant under its own precedent. See Funakoshi, 65 Haw. 315, 651 P.2d at 914 ("HRS § 11-173.5(b) ***does not provide for a judgment that would invalidate the primary election and allow a new election***. The legislature only provided for this extraordinary remedy in its statutory provisions pertaining to general, special general and special elections.") (emphasis added). The relief sought here is well beyond that permitted by law. The motion to dismiss must be granted.

2. Taomae Does Not Justify Plaintiffs' Attempt to Invoke Jurisdiction Here

Plaintiffs invoke a specific line of cases for "not typical" election contests, namely, Watland v. Lingle, 104 Hawai'i 128, 85 P.3d 1079 (2004) and Taomae v. Lingle, 108 Hawai'i 245, 118 P.3d 1188 (2005). FAC at 4. Kahalekai v. Doi, 60 Haw. 324, 590 P.2d 543 (1979), is also pertinent, as it is the source of this line of authority. These three cases are *not* consistent with Plaintiffs' assertion of jurisdiction here, for several reasons. First, this line of cases concerns *constitutional amendments* on a general election ballot, not just any case to do with a primary election. Second, all three of these cases had thirty voters as the plaintiffs, while this case does not. And third, none of these cases required the kind of fact-finding that Plaintiffs' case would require here.

The first and most important reason why the Taomae line of cases does not assist Plaintiffs here is because all three cases concerned the constitutionality of a *constitutional amendment*. ***None of these cases suggest that their jurisdictional basis extends beyond that specific, narrow ground.*** Taomae, 108 Hawai'i at 250, 118 P.3d at 1193 ("This court has jurisdiction over cases challenging the validity of constitutional amendments presented to the voters at a general election[.]"); Watland, 104 Hawai'i at 135, 85 P.3d at 1086 ("the plaintiffs in

this case raise questions of procedure regarding an amendment to the Hawai'i Constitution[.]"); Kahalekai, 60 Haw. at 330, 590 P.2d at 548 (deciding that the court has "jurisdiction over the subject matter of this action" to "ascertain the validity of changes in the constitution[.]") (citation and internal quotation marks omitted). Plaintiffs assume—with no legal support whatsoever—that because Taomae allowed a case *regarding a constitutional amendment* to proceed even though it was not a typical election contest, that means *any case about anything to do with an election* can proceed in the same way. FAC at 3-4. Nothing in Kahalekai, Taomae or Watland justifies this broad, boundless proposition. Instead this line of cases establishes original jurisdiction in this Court for cases concerning the propriety of constitutional amendments, and nothing else. Taomae, 108 Hawai'i at 251 n.13, 118 P.3d at 1194 n.13 (describing this line of cases as those "like the one at bar, in which a constitutional amendment that has been presented to the voters at a general election is disputed."). Plaintiffs' case has nothing to do with a constitutional amendment; it therefore cannot fall under this line of authority.[5]

Second, in general, only a group of ***thirty*** voters may file an election contest. HRS § 11-172. Taomae does say that it is not a typical election challenge and therefore "the burden of proof is different; the complaint does not need to allege that different action by Defendants would have affected the outcome of the election[.]" 108 Hawai'i at 250, 118 P.3d at 1193. But Taomae says *nothing* about the thirty-voter requirement. In fact, ***Kahalekai, Watland, and***

[5] Amendments to the constitution are placed on the ballot only at the *general* election. Haw. Const. art. XVII, §§ 2, 3. Under the Taomae line of cases, therefore, this Court could act only *after* the general election had already been concluded. Applying the same idea—some kind of "not typical" election challenge that need not meet the strict requirements of part XI of chapter 11—would be *far* more problematic if applied to *primary* elections. This is so because the primary, by its very nature, is a necessary step in preparing for the *general* election. See, e.g., HRS § 12-1 (candidates appearing on the general election ballot must be nominated by the primary). The 2014 election is not finished. Plaintiffs' complaint asks this Court to derail this process while the State is still in the middle of it. The Taomae line of cases, in contrast, poses no such problem.

Taomae* each had more than thirty voters who initiated the challenge.** Kahalekai, 60 Haw. at 324, 590 P.2d at 543 (34 voters); Watland, 104 Hawai'i at 130, 85 P.3d at 1081 (46 voters); Taomae, 108 Hawai'i at 246, 118 P.3d at 1189 (38 voters). So, despite Plaintiffs' unfounded assumptions, this Court *cannot have decided* in any of those cases that this fundamental requirement of part XI of chapter 11 does not apply to election challenges raised against constitutional amendments.[6] FAC at 3. Part XI of chapter 11 ***is the basis for this Court's jurisdiction under Taomae. See Kahalekai, 60 Haw. at 330, 590 P.2d at 548 ("HRS Chapter 11, Part XI, vests in this court jurisdiction over the subject matter of this action."). Despite Plaintiffs' unfounded assumption, FAC at 3, this Court has *never* decided that election contests brought against constitutional amendments need not meet the thirty-voters requirement. Even if this case had challenged a constitutional amendment, Plaintiffs would have this Court ignore this requirement. But there is no basis in the case law to do so.

There are sound reasons, of course, why the thirty-voter requirement should still apply to any case in which a party seeks to invoke this Court's *original* jurisdiction to rule on an *election*. Attempting to enjoin an election is a *very* serious matter. See, e.g., Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) ("There is no doubt that the right to vote is fundamental, but a federal court cannot lightly interfere with or enjoin a state election. The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."). The Legislature had good reason in setting a thirty-voter minimum before individuals can invoke this Court's original jurisdiction under part XI of chapter 11, HRS. This is a condition of the jurisdiction granted under part XI of chapter 11; Plaintiffs fail to meet this condition here.

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[6] By the same theory, the ACLU cannot be a plaintiff in this case at all. FAC at 6. It is neither a candidate, nor a qualified political party, nor thirty voters. HRS § 11-172.

Finally, Kahalekai, Watland and Taomae all turned on questions of law regarding the constitutionality of various constitutional amendments, namely, the legal process by which the challenged amendments had been ratified. See Taomae (concerning how the proposed amendment passed the legislature); Watland (concerning publication and distribution requirements governing proposed amendments); Kahalekai (concerning how the amendment was introduced to the electorate). None of these cases depended on the kind of *inherently factual* questions Plaintiffs would put in front of this Court now. Plaintiffs' entire case depends on ***facts***: namely, unattested allegations that these six named individuals (and speculation about numerous other unnamed individuals) were physically unable to go to polls on the day of the primary election. Resolving the question of whether those allegations are true is not a question of law; it is a question of fact that would necessarily require discovery, fact-gathering, and possibly a trial. We have circuit courts for that.[7] There is nothing in Kahalekai, Taomae or

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[7] The same is true for Plaintiffs' allegation that HRS § 11-92.3 is unconstitutional. FAC at 22-23. The complaint does not specify whether the claim raised is facial or as-applied. State Defendants assume it must be an as-applied challenge as it concerns the named plaintiffs, that is, the allegation by *these named individuals* were unable to vote in the primary election. FAC at 13-17. A facial challenge might be raised by Plaintiffs' more general allegations regarding the discretion conferred by HRS § 11-92.3. FAC at 23 (¶ 64).

For purposes of this motion, the difference is immaterial. For either challenge, a proper plaintiff with standing could presumably bring an action *in circuit court*, requesting a declaratory ruling that a state statute had been applied against them in an unconstitutional manner. That an election is imminent is no answer: election cases are *routinely* litigated after the elections in question have already taken place. See, e.g., Porter v. Jones, 319 F.3d 483, 490 (9th Cir. 2003) ("[T]he inherently brief duration of an election is almost invariably too short to enable full litigation on the merits.") (collecting cases). Disputes about elections often fall into the capable-of-repetition-yet-evading-review exception to the mootness doctrine. See, e.g., Clark v. Arakaki, 118 Hawai'i 355, 360-61, 191 P.3d 176, 181-82 (2008) (addressing merits of appeal concerning dispute about candidate's nomination papers under the capable-of-repetition-yet-evading-review exception to the mootness doctrine); Rees v. Carlisle, 113 Hawai'i 446, 456, 153 P.3d 1131, 1141 (2007) (dispute regarding expenditure of public funds in support of constitutional amendment fell under same exception to the mootness doctrine, even after general election had already passed).
To the extent Plaintiffs fear they have no venue in which to put forth their constitutional arguments, this is patently false. Instead of filing in the proper court, Plaintiffs instead look to

Watland that suggests that the special form of election contests for constitutional amendments can or should be extended to *any* case raising untested factual allegations, with the only prerequisite being that the case somehow concerns an election. The motion to dismiss must be granted.

B. Even if Plaintiffs' Case Did Present a Proper Election Challenge, Plaintiffs Have Failed to Present a Claim Upon Which Relief Could be Granted

As explained above, State Defendants believe this case is not a true election challenge. Plaintiffs are instead attempting to expand the jurisdictional reach of chapter 11 without having to comply with any of its requirements. As detailed above, neither chapter 11 nor the Taomae line of cases supports their assertion of jurisdiction here. Importantly, however, *even if* this case is considered an election challenge, this Court must still dismiss the complaint now, for failure to state a claim. Plaintiffs' complaint is transparently insufficient to raise a proper election contest.

1. Facts Alleged in the First Amended Complaint[8]

These are the central allegations of the complaint. As explained below, they are insufficient to assert a claim under the election contest statutes. According to the first amended complaint, Frances Lathers, Merrill Lathers, Cassandra Wylie, Brad L. Coffel, Kathleen Walker, and Andrew Leo are all registered voters residing in Precinct 04-04. FAC ¶¶ 6-11. All of these individuals were unable to vote on August 9, 2014, in their precinct polling place, because of the damage caused by Tropical Storm Iselle. Id. Frances Lathers, Merrill Lathers, Cassandra Wylie, and Brad L. Coffel attempted to vote on August 15, 2014 at Keonepoko Elementary School, but were turned away. FAC ¶¶ 6-9, 38-43.

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commandeer the primary election contest process—which does *not* contemplate serving as the vehicle for constitutional challenges to other sections of chapter 11—to bypass the normal process of litigation entirely. See HRS § 11-173.5; Funakoshi.

[8] The State Defendants do not include Plaintiffs' statements of opinion, conjecture or legal conclusions in this recitation of facts.

On August 6, 2014 Governor Abercrombie signed an emergency proclamation stating that "the danger [from Hurricanes Iselle and Julio] is of such a magnitude to warrant protective action in order to provide for the health, safety, and welfare of the people." FAC ¶ 22. On Friday, August 8, 2014 at approximately 2:30 a.m., Tropical Storm Iselle (downgraded from a hurricane) made landfall on the island of Hawaii, approximately five miles east of Pahala. FAC ¶ 23. This storm caused significant damage in the Pahoa region of Hawaii County, knocking down trees and power lines, blocking roads and cutting power to thousands of area residents. FAC ¶ 24.

On August 8, 2014, the Office of Elections issued a press release announcing the primary elections would go forward as originally scheduled. FAC ¶ 25. Later that same day, the Office of Elections announced that two polling places: Hawaii Paradise Community Center and Keoneopoko Elementary School (Precincts 04-01 and 04-02, respectively) would be closed because of damage to the roadways leaving some communities in Puna isolated. FAC ¶ 26. The announcement also stated that voting in the rescheduled election would be done by absentee ballot, but all other polling places would be open the following day. Id.

On August 9, 2014, thousands of homes remained without power in lower Puna, including large regions of Precincts 04-03 and 04-04. FAC ¶ 27. On August 9, 2014 the primary election took place with all polling place being open with the exception of Precincts 04-01 and 04-02. FAC ¶ 28. Signs were posted on the closed polling places advising voters that they would be mailed a ballot at a later date. Id. The six named Plaintiffs allege they were unable to access their polling places because of the damage. FAC ¶ 31. The complaint speculates that an unknown number of other unidentified voters had their driveways or roads leading to the polling places blocked by fallen trees. Id.

On August 11, 2014, Defendant Nago issued a press release stating that the election for Precincts 04-01 and 04-02 only would be held on Friday, August 15, 2014. FAC ¶ 33. Defendant Nago mailed and/or delivered notice of this decision to the registered voters of the two precincts. FAC ¶ 34. The decision made was to consolidate the two precincts into a single voting location, Keonepoko Elementary School. Id.

The six named Plaintiffs believed that they would be permitted to vote on August 15, 2014. FAC ¶ 37. The complaint speculates that an unknown number of unidentified persons from precincts other than Precincts 04-01 and 04-02 also travelled to Keonepoko Elementary School and attempted to vote, but were turned away. Id.

Plaintiffs do not allege that their votes would have changed the outcome of any primary election. FAC ¶ 47. Plaintiffs generally assert that there was a possibility that if *more than a hundred and forty other unidentified voters* in precincts other than Precincts 04-01 and 04-02 been allowed to vote on August 15, 2014, the outcome of the race for Hawaii County Council, District 4 *might* have been different. FAC ¶¶ 47-49. None of these hypothetical voters are named in the complaint.

2. Plaintiffs Have Failed to State a Claim to Challenge the Results of the 2014 Primary Election

Even if this Court determines this case is a challenge to the results of this primary election and assumes jurisdiction, Plaintiffs have failed to state a claim upon which relief can be granted. A complaint challenging the results of a primary election pursuant to HRS § 11-172 fails to state a claim unless the plaintiff demonstrates errors, mistakes or irregularities that ***would change the outcome of the election***. This is the clear, consistent, unequivocal precedent of this Court. See Tataii v. Cronin, 119 Hawai'i 337, 339, 198 P.3d 124, 126 (2008); Akaka v. Yoshina,

84 Hawai'i 383, 387, 935 P.2d 98, 102 (1997); Funakoshi v. King, 65 Haw. 312, 317, 651 P.2d 912, 915 (1982); Elkins v. Ariyoshi, 56 Haw. 47, 48, 527 P.2d 236, 237 (1974).

A plaintiff challenging the results of a primary election must show that he or she has actual information of mistakes or errors sufficient to change the results. Tataii, 119 Hawai'i at 339, 198 P.3d at 126; Akaka, 84 Hawai'i at 388, 935 P.2d at 103; Funakoshi, 65 Haw. at 316-317, 651 P.2d at 915. ***It is not enough for a plaintiff challenging an election to allege a poorly run and inadequately supervised election process. An election contest cannot be based upon mere belief or indefinite information.*** Tataii, 119 Hawai'i at 339, 198 P.3d at 126; Akaka, 84 Hawai'i at 387-388, 935 P.2d at 102-103. "Indefinite information" is exactly the kind of information that makes up much of Plaintiffs' complaint here.

According to HRS § 11-173.5(b), in a primary election challenge, the Supreme Court has the authority to decide *only* which candidate was nominated or elected. Funakoshi.

Taking the factual allegations of the first amended complaint, as true and viewing them in the light most favorable to the Plaintiffs, Plaintiffs cannot prove any set of facts which would entitle them to relief. There is an insufficient number of Plaintiffs to even invoke this Court's jurisdiction. HRS §11-172. And, even if there were, Plaintiffs have failed to present specific acts or actual information of mistakes, error or irregularities sufficient to change the results of the election. ***Plaintiffs do not even assert that their votes would have changed the outcome of any primary election***. FAC ¶ 47. This, by itself, shows that the first amended complaint fails to a state a claim upon which could be granted. Funakoshi, Akaka, Tataii.

Instead, Plaintiffs generally assert that there was a mere possibility that had voters in precincts other than Precincts 04-01 and 04-02 been allowed to vote on August 15, 2014 the outcome of the race for Hawaii County Council, District 4 *might* have been different. FAC ¶¶

47-49. Plaintiffs have provided no verified *facts* from which this Court could determine that had the election been postponed or held in a different manner *the result would have been different.* See FAC ¶ 37 (Plaintiffs state "some" voters from outside of Precincts 04-01 and 04-02, including the Plaintiffs, believed they would be permitted to vote on August 15, 2014; FAC ¶ 31 (Plaintiffs state that "many" voters were unable to travel to the polls that were open on August 9, 2014). Plaintiffs' opinion that the outcome of this election *might* have been different had the election been held in a different manner is merely that—their opinion. It does not even amount to an allegation, because Plaintiffs do not even assert the facts that would be necessary to make that allegation.

Plaintiffs' decision to file this action in this Court in its present form appears to be a deliberate attempt to evade the requirements for a primary election contest as set forth in HRS §§ 11-172 and 11-173.5. Election contests are not mere academic exercises. They are designed to determine which candidate prevailed so the results can be used to prepare the general election ballot. For very practical reasons, the remedies set forth in HRS § 11-173.5 are limited: "The judgment shall decide what candidate was nominated or elected, as the case may be[.]" As noted above, Plaintiffs may seek a remedy elsewhere for their belief that HRS § 11-92.3 is unconstitutional.

Because Plaintiffs have failed to show that they have ***actual*** information of mistakes or errors sufficient to ***change the results*** of the 2014 primary election, they have failed to state a cause of action upon which relief can be granted.[9] This action must be dismissed, with prejudice.

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[9] Plaintiffs attempt to make the holes in their case into a virtue by asserting that their case need not meet the requirements of HRS § 11-172 because it is a "not typical" election contest. FAC at 3. As explained above, this logic is fundamentally flawed because nothing about the Taomae

C. Plaintiffs' Requested Relief Threatens to Derail the 2014 General Election

As explained above, because Plaintiffs' requested relief is not among the *extremely* narrow relief afforded in primary election contests, it is completely inappropriate for them to request that relief here. FAC at 25-27. In addition to all the reasons asserted above, there is one other reason why this Court must not to re-open the primary election: it would further delay the complex process by which the Office of Elections prepares for the *general* election, which is fast approaching.

The 2014 general election is scheduled for November 4, 2014. Haw. Const. art. II, § 8. The process of preparing for the general election has already begun. Of course, because the primary election determines the general election candidates in every race with a contested primary, the primary election itself is a critical part of preparing for the general election. Plaintiffs apparently ask this Court to hold Hawaii's 2014 primary election open for another month—enough time to hold *another* primary election. FAC at 2. But the Office of Elections cannot certify the results of an election until it is finished. See HRS § 11-156 ("[c]ertificates of election shall be delivered only after . . . the expiration of time for bringing an election contest.").

This delay means that the statutory process governing election contests, HRS § 11-171 et seq., could hypothetically begin *again* if another election were held as Plaintiffs apparently request. The election contest process can take up to 21 days. HRS § 11-173.5. The Office of Elections cannot finalize the *general* election ballot until the results of any *primary* election

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line of cases suggests it is properly applied here. In sum, therefore, Plaintiffs have filed a flawed and incomplete election contest and are fully aware it does not meet the requirements for original jurisdiction in this Court. FAC at 3.

contest is determined. HRS § 12-1 ("[a]ll candidates for elective office, except as provided in section 14-21, shall be nominated in accordance with this chapter and not otherwise.").[10]

And—this is important—the Office of Elections must comply with federal law requiring that general election ballots be mailed to absentee and oversees voters (particularly voters in the uniformed services) no later than *45 days before* the general election (this year, the Office of Elections will have to do so by Friday, September 19, 2014). 42 U.S.C.A. § 1973ff-1. Of course, there are other details, procedures, and complexities involved as well. But even if we confine ourselves to only the most basic legal requirements as cited here, Plaintiffs' belief that *another* primary election could be held now and would still allow the Office of Elections to comply with the law is mistaken at best. FAC at 2 n.1. There is far more to this complex process than the 45-day *minimum* time period between the primary and general elections stated in Hawaii Constitution Article II, section 8.[11]

The point of all of this is simple: an election has many moving parts. Move one date and you move them all. A delay of even one week beyond that which is absolutely, strictly necessary will make it increasingly difficult for the Office of Elections to prepare for the general election. In other words, as one court observed, "[t]he whole election machinery is immobilized until this uncertainty is resolved." Kruidenier v. McCulloch, 158 N.W.2d 170, 173 (Iowa 1968). The primary election cannot and must not be delayed any further. This Court must decline Plaintiffs' invitation to derail the preparations for the general election.

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[10] HRS § 14-21 governs the electors for presidential candidates and is not presently relevant.

[11] Plaintiffs' suggested cut-off date for the primary election (September 20, 2014, see FAC at 2, n.1) would actually put the State in clear violation of federal law, which requires that the State *mail* the ballots to oversees voters ***45 days in advance***. 42 U.S.C.A. § 1973ff-1. Another primary election could trigger another election contest period, preventing the Office of Elections from finalizing the general election ballot before it can be mailed. And obviously it takes time to prepare the ballots. Plaintiffs ignore these practicalities.

CONCLUSION

This Court does not have jurisdiction over this case. The first amended complaint, though titled an "original proceeding," is nothing of the sort. It is neither a standard election contest nor the unique form of election challenges permitted by Taomae. It asks for relief that stretches far beyond that permitted by the narrow form of relief envisioned by chapter 11 for *primary* elections. It is premised on unproven, contested questions of fact that would require *trial court litigation* to resolve. It has an insufficient number of plaintiffs, and fails to state the fundamental allegations that form the underlying premise of *each and every* election challenge: that the result of the election might be different. State Defendants respectfully urge this Court to grant their motion to dismiss.

DATED: Honolulu, Hawaii, August 25, 2014.

Respectfully submitted,

/s/ Deirdre Marie-Iha
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Deputy Attorney General

Attorney for State Defendants

SCOT 14-0001069

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FRANCES LATHERS; MERRILL LATHERS; CASSANDRA WYLIE; BRAD L. COFFEL; KATHLEEN WALKER; ANDREW LEO; and AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I, Plaintiffs, vs. NEIL ABERCROMBIE, in his official capacity as the Governor of the State of Hawai'i; DAVID M. LOUIE, in his official capacity as the Attorney General of the State of Hawai'i; SCOTT NAGO, in his official capacity as Chief Election Officer for the State of Hawai'i; and STEWART MAEDA, County Clerk, Office of Elections, County of Hawai'i, Defendants.	ORIGINAL PROCEEDING

CERTIFICATE OF SERVICE

I certify that the State Defendants' Motion to Dismiss for Lack of Jurisdiction was either served electronically (through the Court's JEFS system), or conventionally (by mailing a copy via USPS, first class, postage prepaid), upon the following on August 25, 2014.

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DATED: Honolulu, Hawai'i, August 25, 2014.

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